84-366

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No. .....

In The

Supreme Court of the United States

October Term, 1984

RAY BELL OIL COMPANY, INC.,

Appellant,

vs.

STATE OF NEW MEXICO,

Appellee.

ON APPEAL FROM THE NEW MEXICO COURT OF APPEALS

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Does a State criminal antitrust statute which eliminates any requirement of *mens rea* in imposing felony penalties of five years imprisonment and a quarter-of-a-million dollar fine upon a defendant entering into a contract or combination which has the unintended or unforeseen effect of controlling quantities, prices or rates of exchange of products violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

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OPINIONS BELOW

The opinion of the New Mexico Court of Appeals, which appears in the appendix hereto, page 1A, *infra,* has not yet been published in either the official or unofficial reports.

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JURISDICTION

This is an appeal from a final judgment of the New Mexico Court of Appeals reversing a State trial court's dismissal of a count of an indictment against appellant. The opinion of the New Mexico Court of Appeals was originally entered on May 24, 1983. A timely motion for rehearing was denied on June 9, 1983. Subsequently, appellant petitioned for a writ of certiorari to the New Mexico Supreme Court and that court granted a writ of certiorari to review the decision of the court of appeals in an order entered June 30, 1983. Subsequently, without further decision or opinion, the New Mexico Supreme Court entered an order on June 20, 1984, quashing the writ of certiorari as having been improvidently issued and returning the file to the court of appeals. A timely notice of appeal to this court was filed in the New Mexico Court of Appeals on August 29, 1984.

This appeal is being docketed in this Court within ninety days of the date the New Mexico decision became final, June 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

> . . . . Nor shall any state deprive any person of life, liberty or property, without due process of law.

Section 57-1-1B, New Mexico Statutes Annotated:

> B. Every contract, agreement, combination or conspiracy which controls the quantity, price or exchange of any article of manufacture, product of the soil or mine or any goods or services in restraint of trade is hereby declared to be unlawful.[1]

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STATEMENT OF THE CASE

This appeal arises from a criminal antitrust prosecution against appellant and others. The State proceeded under an indictment charging appellant, in the alternative, with violating Sections 57-1-1A or 57-1-1B (the statutory provision that is the subject of this appeal) N.M. Stat. Ann., as a result of an alleged combination that controlled or sought to control the price of gasoline. These statutory provisions were part of a recently enacted series of restraint of trade statutes which replaced an older restraint of trade statute providing for misdemeanor penalties.

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[1] Although Section 57-1-1B is the statutory provision construed by the court below to dispense with *mens rea* requirements, other provisions of the restraint of trade statutes, Sections 57-1-1 to 57-1-15, may be relevant to the interpretation of that section and appear for the Court's convenience in the Appendix at page 27A, *infra*.

In the course of pretrial proceedings, the district court was called upon to resolve what the State referred to as a "glitch" in the statute and determine whether the State could proceed to trial under both alternatives. The trial court ruled that the two sections of the statute dealt with the same general subject matter, but that Section 57-1-1B was the more specific statute with respect to price fixing combinations and under New Mexico law was the provision under which this prosecution must be brought. The court, therefore, dismissed alternative Section A. There was no argument made by any party nor any ruling of the court at this stage of the proceedings that raised a strict liability issue.

The State appealed the dismissal of the alternative count to the New Mexico Court of Appeals. In its brief in chief, the State did not raise any arguments concerning a strict liability interpretation of Section B of the statute. Its position was that the court need not determine the meaning of Section B, but should look only to the appropriate interpretation of Section A and its applicability to a criminal antitrust prosecution. The first time the strict liability argument was proposed in any sense by the State was in its reply brief.

The New Mexico Court of Appeals reversed the dismissal order of the trial court. In arriving at that result, the court construed Section A of the statute as being essentially a restatement of the Sherman Act, including both rule of reason and *per se* offenses. To give meaning to Section B, it construed that section as a strict liability criminal statute which did not have any *mens rea* requirement. In essence, it held that a person or business could

be found guilty of the felony of price fixing by entering into a combination or contract which had the unforeseen or unintended effect of controlling prices, quantities or rates of exchange.

Appellant filed a motion for rehearing, arguing, *inter alia,* that the construction placed on Section B of the statute by the opinion of the New Mexico Court of Appeals was violative of the due process clause of the Constitution of the United States. That motion was denied.

Appellant then successfully petitioned the New Mexico Supreme Court for a writ of certiorari, again raising the issue that the opinion of the New Mexico Court of Appeals was in conflict with the due process clause of the Fourteenth Amendment. Approximately a year later, the New Mexico Supreme Court, without opinion, entered an order dismissing its writ of certiorari as having been improvidently issued.

This appeal followed.

———o———

THE QUESTIONS ARE SUBSTANTIAL

This case presents squarely the troubling constitutional issues avoided by this Court's decision in *United States v. United States Gypsum Co.,* 438 U.S. 422 (1978), interpreting the Sherman Act to require proof of *mens rea* in a criminal antitrust prosecution. As a result of the interpretation placed on the New Mexico antitrust statute by the state court, the issues are now before this Court. An affirmance in this case would have far-reaching implications and potentially disastrous effects on the

conduct of business throughout the United States, since the precedent established will clear the way for courts and legislatures, including the United States Congress, to dispense with any element of criminal intent in criminal antitrust statutes.

The decision of this Court will also be important in determining whether a line can ever be drawn to mark the limits beyond which strict liability criminal offenses may not go. If a person may be subjected to five years' imprisonment and felony disabilities for unintended and unforeseen effects on trade in such a vague context as presented by the antitrust laws, it would be difficult to imagine a case in which strict liability could not be upheld. That result, in which a requirement of *mens rea* could be eliminated in any criminal statute, would shatter the long-recognized relationship between free will and individual responsibility in imposing punishments provided by the criminal law. As Mr. Justice Jackson observed in *Morissette v. United States,* 342 U.S. 246, 250, (1952), "the contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

Although strict liability offenses have been upheld by this Court and others, it has always been recognized that there are limitations on the doctrine. It has also been recognized that constitutional due process considerations of vagueness, fair warning, proportionality, and fundamental fairness must be taken into account. *United*

States v. United States Gypsum Co., supra; Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952); *Screws v. United States,* 325 U.S. 91 (1945); Saltzman, *Strict Criminal Liability and the United States Constitution; Substantive Criminal Law Due Process,* 24 Wayne L.Rev. 1571 (1978); Erlinder, *Mens Rea, Due Process, and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law,* 9 Am.J.Crim.L. 163 (1981).

The decision of the New Mexico Court of Appeals is at odds with every guideline established by this Court and other courts in defining the permissible limits of strict liability offenses. Although those guidelines are necessarily interrelated, they may be separated into the following seven factors.

The first is whether the penalty imposed is relatively small. *Morissette v. United States,* 342 U.S. 246 (1952). The penalties in the New Mexico statute are approximately twice as severe as the penalties noted by this Court to be severe in the recent Sherman amendments involved in *Gypsum. United States v. United States Gypsum Co.,* 438 U.S. 422, 442 n. 18 (1978).

The second consideration is whether imprisonment may result from a conviction. Sayre, *Public Welfare Offenses,* 33 Colum.L.Rev. 55 (1933) (strict liability generally inappropriate when offense punishable by imprisonment), cited by this Court in *United States v. United States Gypsum Co., id.* The statute now before this Court provides for a five year penitentiary sentence upon conviction.

The third consideration is whether the penalty results in stigma or grave damage to a defendant's reputa-

tion. *United States v. Morissette, supra.* "The only real basis for distinction between crimes and civil wrongs lies in the moral condemnation which the community visits upon a criminal. . . ." W. LaFave and A. Scott, *Handbook on Criminal Law*, §3 (1972). The felony penalties, the substantial potential imprisonment and the substantial quarter-of-a-million dollar potential criminal fines all necessarily result in stigma and great damage to reputation, particularly in the business context, where reputations for lawfulness and honesty are so necessary.

The fourth factor generally recognized is the need to promote public good by regulating conduct rather than punishing offenders for wrongdoing. *United States v. United States Gypsum Co., supra; United States v. Balint*, 258 U.S. 250 (1922). As this Court noted in *Gypsum*, the availability of a range of non-penal alternatives to the criminal sanctions of the Sherman Act negates the imputation of any purpose on the part of Congress to use strict liability criminal sanctions for regulatory goals. *United States v. United States Gypsum Co.*, 438 U.S. at 442. Similarly, the New Mexico statutes contain a range of civil sanctions, including civil penalties, Section 57-1-7, N.M. S.A., injunctive relief, Section 57-1-8, N.M.S.A., and treble damage civil actions, Section 57-1-3, N.M.S.A.

Another factor is whether the defendant is in a position to avoid violating the criminal law by the exercise of reasonable care. *Morissette v. United States, supra.* As this Court observed in *Gypsum*, the behavior proscribed by the antitrust law "is ofen difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *United States*

v. United States Gypsum Co., 438 U.S. at 440-441. Where the lawful conduct is difficult to distinguish from the unlawful conduct, the excessive caution created by a strict liability statute will not necessarily redound to the public's benefit. As the Court observed, there is a distinct danger of overdeterrence of beneficial procompetitive conduct. *Id.*

A related factor in the context of this case is the question of vagueness. A vague statute violates the due process clause both by its failure to warn the citizen of the conduct which he must avoid and by its failure to provide sufficient guidelines for enforcement authorities and triers of fact to avoid arbitrary enforcement of the laws. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Connally v. General Const. Co.*, 269 U.S. 385 (1926). Interpreting a statute so as to require criminal intent may save a badly written statute from being invalidated as unconstitutionally vague. *Screws v. United States*, 325 U.S. 91 (1945). The New Mexico courts have bypassed that opportunity by definitively construing this statute as a strict liability penal statute. Since they also rejected appellant's argument that such a construction would render the statute unconstitutionally vague, that issue is now squarely presented to this Court. *See, Colautti v. Franklin*, 439 U. S. 379 (1979), in which this Court struck down a Pennsylvania statute for vagueness, relying heavily on the fact that the statute had no scienter requirement. Under New Mexico law, a strict liability statute appears to have no scienter requirement whatsoever. *See*, Daniels and Storch, *Survey of New Mexico Law: Criminal Law*, 14 N.M.L.Rev. 89, 96 (Winter, 1984).

The final factor can be characterized as fundamental fairness. As this Court noted in *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 342 (1952), "the requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the regulation would be so unfair that it must be held invalid." To impose serious felony liability, including imprisonment and large fines, for conduct which is essentially innocent, though having unforeseen consequences harmful to competition, is fundamentally unfair. It is at least as unfair as punishing one for being a narcotic addict, as in *Robinson v. California,* 370 U.S. 660 (1962). In that situation, this Court held that such a criminal statute violated the due process clause of the fourteenth amendment as imposing cruel and unusual punishment. *Cf. Lambert v. California,* 355 U.S. 225 (1957). The proportionality concerns of *Solem v. Helm,* — U.S. —, 103 S. Ct. 3001 (1983) are raised by the disproportionate punishment of innocent conduct in this case. The relationship between the disproportionate punishment analysis and the strict liability statute analysis is explored in Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process,* 24 Wayne L.Rev. 1571 (1978).

The due process issues presented by the statute, as interpreted by the New Mexico Court of Appeals, are substantial and serious. Although appellant respectfully submits that the judgment below should be reversed, the import of the issues involved calls for plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to the Attorney General's Office of the State of New Mexico, P.O. Drawer 1508, Santa Fe, NM 87504-1508, this 5th day of September, 1984.

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CHARLES W. DANIELS

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APPENDIX

OPINION OF THE NEW MEXICO COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 6045

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

RAY BELL OIL COMPANY, INC., a corporation,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

ALLEN, Judge

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OPINION

WOOD, Judge.

NMSA 1978, § 57-1-1 (Cum.Supp. 1982), part of our Antitrust Act, pertains to restraint of trade. Prohibited restraints of trade may be dealt with in civil or criminal proceedings. NMSA 1978, §§ 57-1-3 and 57-1-6 (Cum.Supp.

1982). Defendant was charged with criminal restraint of trade. The charge was in the alternative, that defendant violated either Paragraph A or Paragraph B of § 57-1-1. The trial court granted defendant's motion to dismiss the Paragraph A charge; the State appealed. The appeal is concerned with the meaning of Paragraphs A and B.

The motion to dismiss was granted after the State "agreed that either alternative charge was based on an alleged conspiracy among competitors to fix the retail price of gasoline." The trial court concluded: "Where an allegation of fixing prices is the complained of activity . . . the charge must be brought under Section 57-1-1(B) because that subsection specifically refers to conspiracies that control prices whereas Section 57-1-1(A) refers only to conspiracies in restraint of trade." The trial court misread the statute; we reverse.

A comparison of federal action with New Mexico action aids in understanding the meaning of the New Mexico statute. The Sherman Antitrust Act was enacted in 1890. Section 1 of that Act, *see* 15 U.S.C.A. § 1 (Supp. 1982), reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

New Mexico enacted a restraint of trade statute by Laws 1891, ch. 10, § 1. It is compiled as NMSA 1978, § 57-1-1 (orig.pamp.), and reads:

> Every contract or combination between individuals, associations or corporations, having for its object or which shall operate to restrict trade or commerce or control the quantity, price or exchange of

> any article of manufacture or product of the soil or mine, is hereby declared to be illegal.

This 1891 statute did not track the federal statute.

United States v. United States Gypsum Co., 438 U.S. 422, 57 L.Ed.2d 854, 98 S.Ct. 2864 was decided in 1978. *Gypsum* held:

(a) 15 U.S.C.A. § 1 is not a strict liability statute.

(b) "[I]ntent is a necessary element" of a federal criminal antitrust violation; "criminal offenses defined by the Sherman Act should be construed as including intent as an element." (*Id.* 438 U.S. at 443.)

By Laws 1979, ch. 374, § 1, § 57-1-1 was amended to its present wording, which is:

> A. Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is hereby declared to be unlawful.
>
> B. Every contract, agreement, combination or conspiracy which controls the quantity, price or exchange of any article of manufacture, product of the soil or mine or any goods or services in restraint of trade is hereby declared to be unlawful.

NMSA 1978, § 57-1-15 (Cum.Supp. 1982), also enacted in 1979, reads:

> Unless otherwise provided in the Antitrust Act [57-1-1 to 57-1-15 NMSA 1978], the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust lews. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices.

The similarity between 15 U.S.C.A. § 1 and § 57-1-1(A) is obvious. Here the State claims a conspiracy. Both statutes require a conspiracy in restraint of trade.

We look to federal decisions to determine the meaning of "restraint of trade". Section 57-1-15. A conspiracy to fix prices is a per se restraint of trade. This means that the reasonableness of the prices is not an issue. The "rule of reason" does not apply to per se restraints of trade. *Compare Elephant Butte Alfalfa Ass'n. v. Rouault,* 33 N.M. 136, 262 P. 185 (1926).

United States v. Trenton Potteries, 273 U.S. 392, 71 L.Ed. 700, 47 S.Ct. 377 (1927), explains:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. [*Id.* 273 U.S. at 397.]
>
> • • •
>
> The charge of the trial court . . . fairly submitted to the jury the question whether a price-fixing agree-

> ment . . . was entered into by the respondents. Whether the prices actually agreed upon were reasonable or unreasonable was immaterial in the circumstances. . . . [*Id.* 273 U.S. at 401.]

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 84 L.Ed. 1129, 60 S.Ct. 811 (1940), states:

> [T]his Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

Price-fixing agreements, without more, are unreasonable restraints of trade. A crime occurs under 15 U.S.C.A. § 57-1-1(A), if there is a conspiracy to fix prices with the requisite intent. The anticompetitive effect—the price fixing—does not have to occur. *Gypsum* explains:

> Our question instead is whether a criminal violation of the antitrust laws requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the "conscious object" of producing such effects, or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow. While the difference between these formulations is a narrow one, see ALI, Model Penal Code, Comment on § 2.02, p. 125 (Tent. Draft No. 4, 1955), we conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws.[21] [*Id.* 438 U.S. at 444.]

Footnote 21 to *Gypsum* states:

> In so holding, we do not mean to suggest that conduct undertaken with the purpose of producing

> anticompetitive effects would not also support criminal liability, even if such effects did not come to pass. Cf. *United States v. Griffith*, 334 U.S. 100, 105 (1948). We hold only that this elevated standard of intent need not be established in cases where anticompetitive effects have been demonstrated; instead, proof that the defendant's conduct was undertaken with knowledge of its probable consequences will satisfy the Government's burden. [*Id.* 438 U.S. at 444.]

As to the treatment of intent where anticompetitive effects have been demonstrated, Note, Criminal Intent and the Sherman Act: The Label Per Se Can't Take Gypsum Away, 32 Hastings L.J. 499 (1980).

It being stipulated that the criminal charge was based on an alleged conspiracy among competitors to fix the retail price of gasoline, the charge was properly under § 57-1-1(A) unless § 57-1-1(B) makes § 57-1-1(A) inapplicable.

Section 57-1-1(B) has no counterpart in the federal statute. It is similar to § 57-1-1(A) in that it applies to a conspiracy in restraint of trade. However, Paragraph B has an additional requirement, a consequence is required—a "conspiracy which controls the quantity, price or exchange of any article of manufacture, product of the soil or mine or any goods or services [.]" This language comes from the New Mexico statute of 1891.

Inasmuch as "control" is not required to violate § 57-1-1(A), *see United States v. Socony-Vacuum Oil Co.*, why was the "control" language carried forward into the amendment enacted in 1979? *State v. Gurley*, 25 N.M. 233, 180 P. 288 (1919), provides the answer. *Gurley*, discussing our 1891 Act, states:

> In order for the contract to be violative of the statute it must have been one having for its object, or which

would operate to restrict trade or commerce, or control the quantity, price, or exchange of the broom corn in question. In 19 R.C.L. p. 115, it is said:

> "It is generally agreed that if the necessary effect of the contract or combination is to stifle or directly or necessarily to restrict free competition or lessen it to an unreasonable extent, such contract or combination is under the ban of the law, whatever may have been the intention of the parties."
>
> This we believe to be generally accepted as a correct statement of the law. [*Id.* 25 N.M. at 237.]

Having followed *Gypsum,* and its requirement of intent, in enacting § 57-1-1(A), the Legislature enacted § 57-1-1(B) as a no intent crime. *Compare State v. Barber,* 91 N.M. 764, 581 P.2d 27 (Ct.App. 1978). Where the conspiracy to fix the price of gasoline results in actual control of the price of gasoline, § 57-1-1(B) is violated "whatever may have been the intention of the parties."

Summarizing:

(a) Section 57-1-1(A) is violated by a conspiracy to fix prices with the requisite intent.

(b) Section 57-1-1(B) is violated by a conspiracy to fix prices if the result is control of the price. No intent is required.

The trial court erred in dismissing the charge under § 57-1-1(A), and in ruling that a conspiracy *to* control must be prosecuted under § 57-1-1(B). The charges, being in the alternative, were proper in that one crime was charged as having been committed in two ways. *See State v. Ortiz,* 90 N.M. 319, 563 P.2d 113 (Ct.App. 1977); *State v. Gurule,* 90 N.M. 87, 559 P.2d 1214 (Ct.App. 1977). Trial should

proceed under the alternative charges. If the State's proof is insufficient to show that the alleged conspiracy resulted in control of gasoline prices, the charge under § 57-1-1(B) should not be submitted to the jury.

The order dismissing the charge under § 57-1-1(A) is reversed.

IT IS SO ORDERED.

/s/ Joe W. Wood, Judge

I CONCUR:

/s/ Thomas A. Donnelly, Judge

/s/ Ramon Lopez, Judge (Dissenting)

LOPEZ, J. (Dissenting).

I respectfully dissent.

The majority opinion concludes its decision by stating, "The trial court erred in dismissing the charge under § 57-1-1(A), and in ruling that a conspiracy *to* control must be prosecuted under § 57-1-1(B). The charges, being in the alternative, were proper in that one crime was charged as having been committed in two ways. . . . Trial should proceed under the alternative charges. If the State's proof is insufficient to show that the alleged conspiracy resulted in control of gasoline prices, the charge under § 57-1-1(B) should not be submitted to the jury."

I would agree with much of the majority holding if I accepted the premise that the briefs, facts, statutes, the record on appeal and all legal authorities can reasonably be read and interpreted only as they do so. But I do not agree with that premise.

Our duty is to find the interpretation which can most fairly be said to be imbedded in the statutes in question, in the sense of being most harmonious with the statutory scheme and with the general purposes that the New Mexico Legislature manifested.

My conclusion is that there are other more reasonable constructions and interpretations of the briefs, facts, the record on appeal, the statutes, and the legal authorities applicable to the case at bar.

The sole issue is whether the trial court erred in concluding that price fixing charges must be brought under § 57-1-1(B) instead of § 57-1-1(A) because subsection B specifically refers to conspiracies that control prices wherein § 57-1-1(A) refers only to conspiracies and restraint of trade.

FACTS

This case involves a criminal prosecution under the New Mexico Antitrust Act, §§ 57-1-1 through 57-1-19 (1982 Cum.Supp.). The indictment brought by a Dona Ana grand jury on May 13, 1982 charged that:

> Between the dates of July 1, 1979 and March 12, 1982, in Dona Ana County, State of New Mexico, the above-named defendants, J.B. Ritter Distributing Company, W. K. "Ajax" Simpson, Ray Bell Oil Company, Inc., and Harry M. Bush, Jr., intentionally contracted, agreed, combined, or conspired, one with another or with others, in restraint of trade or commerce, to fix, stabilize, maintain, or control the price of gasoline sold at retail gasoline stations in Dona Ana County, State of New Mexico, contrary to Sections 57-1-1, 6 NMSA 1978 (1981 Supp.), a fourth degree felony; or, in the alternative, the above-named defendants intentionally formed a contract, agreement, combination, or

> conspiracy, one with another or with others, which controlled the quantity, price or exchange of any article or manufacture, product of the soil or mine or any goods or services in restraint of trade; namely gasoline sold at retail gasoline stations in Dona Ana County, State of New Mexico, contrary to Sections 57-1-1, 6 NMSA 1978 (1981 Supp.), a fourth degree felony.

Prior to the proceedings giving rise to this appeal, three of the four defendants, Harry M. Bush, Jr., J. B. Ritter Distributing Co. and W. K. "Ajax" Simpson, entered into plea agreements. The court accepted their pleas of no contest and a separate judgment and sentence was entered as to each of the three defendants.

On November 9, 1982, the morning that the trial of the defendant was to begin, the defendant moved to dismiss the charge in the indictment brought under § 57-1-1(A).

The hearing concluded with the parties working out a stipulation to present the issue properly to this court:

> The Court: And for the reason, and I believe that this type of situation, which you have indicated is a price fixing case, is controlled by B.
>
> Smith: All right, Your Honor, we would stipulate that the State, as stated in argument, and as contained in the language of both alternatives, would proceed if this case went to trial today on prosecution for competitors in the retail gasoline business in Las Cruces, including the defendant, having agreed to fix the price of retail gas.
>
> Daniels: Disagreeing that that occurred, we agree that that is the State's theory and that's all that this case is about, whether or not that existed.
>
> The Court: All right, it will be so stipulated.

The findings and conclusions and the order of the trial court follows:

THE COURT FINDS That:

1. On May 13, 1982, the defendant was charged by grand jury indictment with a one count violation of the New Mexico Antitrust Act, Sections 57-1-1 and 57-1-6, N.M.S.A. 1978, as amended.

2. The indictment charged a violation in the alternative, one alternative being based on the language of Section 57-1-1(A); that the defendant ". . . intentionally contracted, agreed, combined or conspired . . . in restraint of trade or commerce, to fix, stabilize, maintain or control the price of gasoline . . .".

3. The alternative charge in the indictment alleged that the defendant ". . . intentionally formed a contract, agreement, combination or conspiracy . . . which controlled the quantity, price or exchange of any article or manufacture . . . in restraint of trade . . .". 57-1-1(B).

4. For the purpose of this motion and hearing, the defendant and the State stipulated and agreed that either alternative charge was based on an alleged conspiracy among competitors to fix the retail price of gasoline.

CONCLUSIONS OF LAW:

1. Where an allegation of fixing prices is the complained of activity under the New Mexico Antitrust Act, the charge must be brought under Section 57-1-1(B) because that subsection specifically refers to conspiracies that control prices whereas Section 57-1-1(A) refers only to conspiracies in restraint of trade.

2. Under the facts alleged by the State, Section 57-1-1(B) is the more specific statute.

IT IS THE ORDER OF THE COURT, therefore that:

1. The alternative charge of the indictment against the defendant Ray Bell Oil Company, Inc. based on Section 57-1-1(A) is hereby dismissed.

2. The trial in this matter scheduled to begin on November 9, 1982, is hereby continued.

3. The State is given leave to appeal the dismissal of its alternative charge on the grounds that the findings, conclusions and order entered herein involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal will materially advance the ultimate termination of the litigation, to which the defendant has no objection.

I quote the present § 57-1-1:

A. Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is hereby declared to be unlawful.

B. Every contract, agreement, combination or conspiracy which controls the quantity, price or exchange of any article of manufacture, product of the soil or mine or any goods or services in restraint of trade is hereby declared to be unlawful.

Section 57-1-1, before it was amended in 1979, provided:

Every contract or combination between individuals, associations or corporations, having for its object or which shall operate to restrict trade or commerce or control the quantity, price or exchange of any article of manufacture or product of the soil or mine, is hereby declared to be illegal.

Every person, whether as individual or agent or officer or stockholder of any corporation or association, who shall make any such contact or engage in any

> such combination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars [($1,000)] nor less than one hundred dollars [($100.00)], and by imprisonment at hard labor not exceeding one year, or until such fine has been paid.

PROPRIETY OF THE TRIAL COURT'S ORDER OF DISMISSAL

The State challenges the order of the court contending: 1. That the effect of the ruling is to legalize price fixing in New Mexico if it can be proven at trial that the fix did not result in price control; 2. That 57-1-1(A) and (B) do not describe the same offense, rather the proof for each subsection is different and 3. That the trial court erred in applying the specific-general rule of statutory construction.

The defendant argues that the order was correct and that the trial court properly applied the specific-general rule of statutory construction.

This appeal requires the interpretation of § 57-1-1(A) & (B). In doing so it is necessary for me to review the Federal Sherman Act since the New Mexico Legislature has followed it and spoken of it in NMSA 1978, § 57-1-15 (Cum.Supp.1982). Section 57-1-15 provides:

> Unless otherwise provided in the Antitrust Act [57-1-1 to 57-1-15 NMSA 1978], the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices.

Section 57-1-1(A) of the New Mexico Antitrust Act, is substantially similar to section 1 of the Sherman Act:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . .

5 U.S.C.A. § 1 (Supp. 1983).

The argument of the State is that § 57-1-1(A) prohibits price fixing and that since subsection (B) prohibits price control the offenses are different and the charge of violating subsection (A) should not be dismissed. The state also contends that price fixing is a per se violation. I, and the defendant, have no quarrel with the State's contention that price fixing is a per se violation of the New Mexico Antitrust Act.

Per se violations are those in which certain categories of clearly anticompetitive conduct, such as price fixing, are involved. In per se cases the government does not have to prove that the activity constituted a restraint of trade under the particular circumstances. In cases that do not involve conduct that is a per se violation, a "rule of reason" analysis is used to determine whether the conduct constitutes an "unreasonable" restraint of trade. United States v. United States Gypsum Co., 438 U.S. 422, 985 S.Ct. 2869, 57 L.Ed.2d 854 (1978). Price fixing is clearly unlawful under either law, no matter what justification might be offered in defense of the price fixing.

I conclude that price fixing or price control are per se violations.

The Supreme Court of the United States in United States v. United States Gypsum Co., supra, held that an effect on prices even to raise, fix, maintain or stabilize them would not support a criminal conviction under the

Sherman Act without more. The court held specifically that the Sherman Act does not mandate a regime of strict liability criminal offenses and that a defendant's intent is an element of a criminal antitrust offense which must be established by evidence and inferenced drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices. Gypsum was part of a series of recent Supreme Court decisions rejecting a strict liability approach to antitrust litigation. *See* Broadcast Music, Inc. v. Columbia Broadcasting, 441 U.S. 1, 99 S. Ct. 1551, 60 L.Ed.2d 1 (1979); Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967). *See generally,* Criminal Intent and the Sherman Act: The Label Per Se Can't Take Gypsum Away, 32 Hastings L.J. 499 (1980).

The most important difference is found in the basic definitions of the offenses set forth in § 57-1-1. The section is divided into two subsections defining unlawful restraints of trade. Subsection A of the statute is, in essence, a restatement of the sweeping provisions of the Sherman Act, dealing generally with any combinations or conspiracies in restraint of trade.

Subsection B, however, sets forth a specific and discrete category of unlawful restraints of trade of the kind considered to be per se violations of the federal law. It provides in revelant part that "every contract, agreement, combination, or conspiracy which controls the quantity, price or exchange of any" product is unlawful. The lang-

uage appears nowhere in the Sherman Act or any other federal antitrust act. It is quite clearly the statutory definition of certain kinds of conduct specifically prohibited, without requirement of any judicial interpretation of the very general language of subsection A. What the New Mexico legislature has done is to statutorily define certain per se restraints of trade, leaving subsection A to deal with other kinds of restraints of trade. Contrary to the position of the State, § 57-1-15 does not require this court to abdicate the use of New Mexico law to interpret either subsection A or B. *See* Q-T Markets, Inc. v. Fleming Companies, Inc., 394 F.Supp. 1102 (D. Colo. 1975).

An understanding of subsection B is enhanced by a consideration of its history in New Mexico law. The current statute was enacted in 1979, replacing a former statute providing that every contract or combination "having for its object or which shall operate to restrict trade or commerce or control the quantity, price or exchange of any" product is unlawful.

There are two particular differences between the old statute and the new statute which are of importance in construing subsection B. To begin with, the old law did not require the agreement to be successful in achieving its goal. As clearly set forth in the old New Mexico statute, the restraint of trade need not be affected for a violation to occur because § 57-1-1 prohibits a contract or combination which has for its object the restriction of trade or commerce. J. Wechsler, New Mexico Restraint of Trade Statutes—A Legislative Proposal, 9 N.M. L. Rev. 1, 6 (1978-79); *see* W. T. Rawleigh Co. v. Jones, 39 N.M. 381, 47 P.2d 906 (1935).

The new statute has eliminated the "for its object" language and instead requires that the agreement "control" prices.

So the question before this court is whether controlling prices is the same as fixing prices. Subsection B specifically relates to conspiracies controlling prices, and I hold that it should preempt situations alleging price fixing prosecutions pursuant to subsection A.

It is a well established principle of statutory construction in New Mexico that where one statute deals with a subject in general terms and another deals with a part of the same subject in a more specific way, the more specific statute will be considered an exception to the general statute. City of Alamogordo v. Walker Motor Co., 94 N. M. 690, 616 P.2d 403 (1980).

This principle applies whether the special statute was passed before, after or along with the general statute. Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2479, 41 L.Ed.2d 290 (1974); Saiz v. City of Albuquerque, 82 N.M. 746, 487 P.2d 174 (1971); State v. Lujan, 76 N.M. 111, 412 P.2d 405 (1966).

The principle makes even more sense when applied to different provisions of the same statute. In Cromer v. J. W. Jones Construction Company, 79 N.M. 179, 441 P.2d 219 (Ct.App. 1968), this court noted:

> It is likewise well settled that a general provision is controlled by one that is special the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject as against a general provision although the latter standing alone would be

> broad enough to include the subject to which the more particular provision relates.

79 N.M. at 184 (Citations omitted).

A case in point is State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936). In Blevins the defendant was held to be improperly charged under a general statute making it unlawful to sell property which he did not own. The Supreme Court held that he should have been charged under a statute that made it unlawful for any person to sell any cattle he did not own. Proof of selling cattle not owned by the defendant would have justified a conviction under either statute, but the Court held that he could be charged only under the more specific. As the Court noted, in order for a single act to be a violation of two statutes, each statute must require proof of an additional fact which the other does not. In Blevins § 35-2405, the more specific statute, required proof of fact not required by the more general statute; that being the property sold was the livestock described in the special statute. The fact that the general statute required proof of nothing in addition to what was required under the special statute did not justify the defendant's being charged under the general statute. Each offense must require proof of an element not found in the other in order to allow both to be charged. Even under the State's construction, this case is strikingly similar to Blevins.

Under the State's construction, subsection B could require an element not required by subsection A, to wit, that the alleged conspiracy succeeded in controlling prices. The State's interpretation of subsection A, covering conspiracies which do not succeed in controlling prices, would make it an offense which requires nothing to be proved beyond that already required by subsection B.

Under the facts stipulated in this case there is no significant difference between price fixing, conspiracies and price controlling conspiracies. The fixing, stabilizing, maintaining or controlling prices all deal with the same subject matter—restraint of trade. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L. Ed. 1129 (1940); United States v. Trenton Potteries, Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The State stipulated that both charges were based on an alleged conspiracy among competitors to fix retail price of gasoline. The indictment charged one offense, the stipulation contained one alleged conspiracy and the State stipulated that the charge could be brought under either subsections A or B.

Subsections A and B together obviously deal with all activities considered to be unlawful restraints of trade. Subsection B governs conspiracies controlling of fixing prices, quantity and exchange of goods, which are per se violations not requiring proof of a restraint of trade under the particular circumstances. If a conspiracy successfully affects prices, thereby causing real harm to the public, the penalties are those provided in that act. If the conspiracy attempts to control prices but fails to have any such effect, thereby causing no injury in fact, the penalties are those set forth by the New Mexico attempt statute. *See* NMSA 1978, § 30-28-1. In this case, the penalties would be the same that were provided for both successful and unsuccessful conspiracies before the 1979 amendments. NMSA 1978, § 31-19-1A. If the State can show an unreasonable restraint of trade under subsection A, other than an alleged agreement or conspiracy to control prices, quantities or exchange, the State should proceed under that subsection.

The representation of the State in its brief that the trial court's construction of the statute would legalize price fixing in New Mexico is simply incorrect.

I would hold that the charge against the defendant could be brought under either subsection A or B, but since B is a more specific statute it is controlling.

The order of the trial court should be affirmed. Appellate costs should be paid by the State.

/s/ Ramon Lopez
RAMON LOPEZ, Judge

ORDER OF THE NEW MEXICO COURT OF APPEALS DENYING MOTION FOR REHEARING

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 6045

D.C. No. Bern #35807
Otero #150-82
Dona Ana #82-94

Thursday, June 9, 1983

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs.

RAY BELL OIL COMPANY, INC.,
a corporation,

Defendant-Appellee.

JOE W. WOOD, Presiding Judge
RAMON LOPEZ, THOMAS DONNELLY, Judges

In this cause, a motion for rehearing having been filed by appellee, and consideration having been had by all of the members of the original panel,

IT IS ORDERED that the motion for rehearing be DENIED.

/s/ Joe W. Wood, Presiding Judge

ATTEST: A true copy
/s/ Susan Bagwell
Clerk of the Court of Appeals
of the State of New Mexico

By: Jane Gurule, Deputy

WRIT OF CERTIORARI OF THE
NEW MEXICO SUPREME COURT

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Thursday, June 30, 1983

NO. 15,003

RAY BELL OIL COMPANY, INC.,
a corporation,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

PROCEEDING ON CERTIORARI

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised,

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is hereby granted, and the writ of certiorari shall issue from this Court as prayed for in the petition.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

ORDER OF THE NEW MEXICO SUPREME COURT QUASHING WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Wednesday, June 20, 1984

NO. 15,003

RAY BELL OIL COMPANY, INC.,
a corporation,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

PROCEEDING ON CERTIORARI

This cause having heretofore been submitted and taken under advisement, and a writ of certiorari having been issued on June 30, 1983;

NOW, THEREFORE, IT IS ORDERED that the writ of certiorari heretofore issued in this cause on June 30, 1984 is hereby quashed as having been improvidently issued.

IT IS FURTHER ORDERED that the Record in Cause No. 6045 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

FINDINGS, CONCLUSIONS AND ORDER OF THE DISTRICT COURT

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

NO. CR 35807

STATE OF NEW MEXICO,

Plaintiff,

vs.

RAY BELL OIL COMPANY, INC.,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE COURT

[Filed Nov. 15, 1982]

THIS MATTER came before the Court on November 9, 1982, on defendant Ray Bell Oil Company, Inc.'s motion to dismiss the alternative charge against it under Section 57-1-1(A). The defendant appeared through its attorneys, Charles W. Daniels and Nancy Hollander. The State of New Mexico was represented by Deputy Attorney

General Fred C. Smith and Assistant Attorney General James J. Wechsler. Having heard argument of counsel and being otherwise apprised of the facts and premises,

THE COURT FINDS that:

1. On May 13, 1982, the defendant was charged by grand jury indictment with a one count violation of the New Mexico Antitrust Act, Sections 57-1-1 and 57-1-6, N.M.S.A. 1978, as amended.

2. The indictment charged a violation in the alternative, one alternative being based on the language of Section 57-1-1(A); that the defendant " . . . intentionally contracted, agreed, combined or conspired . . . in restraint of trade or commerce, to fix, stabilize, maintain or control the price of gasoline. . . ."

3. The alternative charge in the indictment alleged that the defendant ". . . intentionally formed a contract, agreement, combination or conspiracy . . . which controlled the quantity, price or exchange of any article of manufacture . . . in restraint of trade. . . ." 57-1-1(B).

4. For the purpose of this motion and hearing, the defendant and the State stipulated and agreed that either alternative charge was based on an alleged conspiracy among competitors to fix the retail price of gasoline.

CONCLUSIONS OF LAW:

1. Where an allegation of fixing prices is the complained of activity under the New Mexico Antitrust Act, the charge must be brought under Section 57-1-1(B) because that subsection specifically refers to conspiracies

that control prices whereas Section 57-1-1(A) refers only to conspiracies in restraint of trade.

2. Under the facts alleged by the State, Section 57-1-1(B) is the more specific statute.

IT IS THE ORDER OF THE COURT, therefore, that:

1. The alternative charge of the indictment against the defendant Ray Bell Oil Company, Inc. based on Section 57-1-1(A) is hereby dismissed.

2. The trial in this matter scheduled to begin on November 9, 1982, is hereby continued.

3. The State is given leave to appeal the dismissal of its alternative charge on the grounds that the findings, conclusions and order entered herein involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal will materially advance the ultimate termination of the litigation, to which the defendant has no objection.

/s/ Frank Allen
District Judge

APPROVED:

/s/
Deputy Attorney General

/s/ Charles W. Daniels
Attorney for the Defendant

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NO. 6045

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs.

RAY BELL OIL COMPANY, INC., a corporation,

Defendant-Appellee.

NOTICE OF APPEAL

[Filed August 29, 1984]

Appellee Ray Bell Oil Company, Inc., hereby gives notice of its appeal to the United States Supreme Court from the decision of this court which became final on June 20, 1984, upon the issuance by the Supreme Court of the State of New Mexico of its order quashing the writ of certiorari heretofore issued as having been improvidently issued. This appeal is taken under 28 U.S.C. §§ 1257(2) and 2101.

FREEDMAN, BOYD & DANIELS, P.A.

BY: Charles W. Daniels
20 First Plaza, Suite 212
Albuquerque, NM 87102
(505) 842-9960
Counsel for Defendant-Appellee

I HEREBY CERTIFY that a true copy of the foregoing was mailed to the Office of the Attorney General for the State of New Mexico, this 28 day of August, 1984.
/s/ Charles W. Daniels

NEW MEXICO RESTRAINT OF TRADE STATUTES SECS. 57-1-1 TO -15, NMSA

57-1-1. Contracts, agreements, combinations or conspiracies in restraint of trade.

A. Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is hereby declared to be unlawful.

B. Every contract, agreement, combination or conspiracy which controls the quantity, price or exchange of any article of manufacture, product of the soil or mine or any goods or services in restraint of trade is hereby declared to be unlawful.

57-1-1.1. Short title.

Sections 57-1-1 through 57-1-15 NMSA 1978 may be cited as the "Antitrust Act."

57-1-1.2. Definition.

As used in the Antitrust Act [57-1-1 to 57-1-15 NMSA 1978], "person" means an individual corporation business trust, partnership, association or any governmental or other legal entity with the exception of the state of New Mexico and the United States.

57-1-2. Monopolies.

It is hereby declared to be unlawful for any person to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monoplize, trade or commerce, any part of which trade or commerce is within this state.

57-1-3. Contracts for restraint of trade or monopoly void; civil liability of participants; injunctive relief; purchasers relieved from payment.

A. All contracts and agreements in violation of Section 57-1-1 or 57-1-2 NMSA 1978 shall be void, and any person threatened with injury or injured in his business or property, directly or indirectly, by a violation of Section 57-1-1 or 57-1-2 NMSA 1978 may bring an action for appropriate injunction relief, up to threefold the damages sustained and costs and reasonable attorneys' fees. If the trier of fact finds that the facts so justify, damages may be awarded in an amount less than that requested, but not less than the damages actually sustained.

B. The attorney general may bring an action under Subsection A of this section on behalf of the state, a political subdivision thereof or any public agency.

C. In any action under this section, any defendant, as a partial or complete defense against a damage claim, may, in order to avoid duplicative liability, be entitled to prove that the plaintiff purchaser or seller in the chain of manufacture, production, or distribution who paid any overcharge or received any underpayment, passed on all or any part of such overcharge or underpayment to another purchaser or seller in such chain.

D. For the purposes of this section, "business or property" includes business or nonbusiness purchases and business and nonbusiness injuries.

57-1-4. [Organizations exempted.]

The labor of a human being is not a commodity or article of commerce. No law against monopolies or com-

binations in restraint of trade shall be held or construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for purposes of mutual help, and not having capital stock or conducted for profit to the organization, or to forbid or restrain individual members of such organizations from lawfully carrying out the objects thereof; nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under any law against monopolies or combinations in restraint of trade; provided however that nothing herein contained shall be held or construed to justify any restraint of trade or restriction of competition except such as is incident to the protection and promotion of the interests of the members of such organizations, in view of their situation and circumstances; but such organizations and their objects, and the effectuation thereof, shall prima facie be presumed to be in reasonable restraint of trade or restriction of competition.

57-1-5. Attorney general; investigation.

A. If the attorney general has reasonable cause to believe that a person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978, he may, before bringing any action, apply to the district court of Santa Fe county for approval of a civil investigative demand, demanding, in writing, such person to appear and be examined under oath, to answer written interrogatories under oath, or to produce the document or object for inspection and copying. The demand shall:

(1) be served upon the person in the manner required for service of process in this state, or, if the person cannot be found or does not reside or maintain a principal place of business within this state, in the manner required for service of process in the state in which the person resides, maintains a principal place of business or can be found;

(2) describe the nature of the conduct under investigation;

(3) describe the class or classes of documents or objects with sufficient definiteness to permit them to be fairly identified, if the production of documents or objects is requested;

(4) contain a copy of the written interrogatories, if answers to written interrogatories are sought;

(5) prescribe a reasonable time at which the person must appear to testify, within which to answer the written interrogatories or within which the document or object must be produced;

(6) specify a place for the taking of testimony or for production and designate a person who may be an authorized employee of the attorney general, to be custodian of the document or object; and

(7) contain a copy of Subsections B, C and D of this section.

No demand to produce a document or object for inspection and copying shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued in a civil proceeding by a district court of this state.

The district court shall approve the demand if it finds that the attorney general has reasonable cause to believe that a person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978 and that the demand is proper in form. A demand shall not be issued without approval of the district court.

B. If a person fails to comply with the written demand served upon him under the provisions of Subsection A of this section, the attorney general may file in the district court of the county in which the person resides or in which he maintains a principal place of business within this state or of the county of Santa Fe if the person neither resides nor has a principal place of business in this state a petition for an order to enforce the demand. Notice of hearing the petition and a copy of the petition shall be served upon the person, who may appear in opposition to the petition. If the court finds that the demand is proper in form and there is reasonable cause to believe that the person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978, the court shall order the person to comply with the demand, subject to any modification that the court may prescribe. Upon motion by the person and for good cause shown, the court may make any further protective order in the proceedings that justice requires.

C. Prior to the filing of an action under the provisions of the Antitrust Act [57-1-1 to 57-1-15 NMSA 1978] for the violation under investigation, any testimony taken

or material produced under this section shall be kept confidential by the attorney general unless confidentiality is waived by the person being investigated and the person who has testified, answered interrogatories or produced material, or disclosure is authorized by the court. All court records, including docket, application, petitions, motions and other papers filed under this section shall be open to inspection only to the attorney general and the person upon whom the demand for which inspection is sought has been served, unless otherwise ordered by the court.

D. Any person compelled to appear under this section and required to testify under oath may be accompanied, represented and advised by counsel. An objection may properly be made, received and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege.

57-1-6. Criminal penalty.

A. Any person who violates Section 57-1-1 or 57-1-2 NMSA 1978 shall be guilty of a fourth-degree felony and, for conviction thereof, if a person other than an individual, it shall be punished by a fine not to exceed two hundred fifty thousand dollars ($250,000), or, if an individual, imprisonment in the penitentiary for a determinate term of not less than one year nor more than five years, or by the payment of a fine not to exceed fifty thousand dollars ($50,000), or both such imprisonment and fine in the discretion of the court. An indictment must be found or information or complaint must be filed within three years from the time of the violation.

B. No criminal action may be brought against any person for the same violation for which such person has been convicted in a criminal proceeding for violation of the federal antitrust laws.

C. For the purposes of this section, "individual" means a person other than a corporation, business trust, partnership, association or other governmental or legal entity.

57-1-7. Civil penalty.

A. The attorney general may bring an action for civil penalties in the name of the state against any person for violation of Section 57-1-1 or 57-1-2 NMSA 1978. Any individual who violates Section 57-1-1 or 57-1-2 NMSA 1978 shall be subject to a civil penalty of not more than fifty thousand dollars ($50,000), or, if a person other than an individual, not to exceed two hundred fifty thousand dollars ($250,000).

B. Any person who fails to comply with a final judgment or decree of a court of this state issued for a violation of the Antitrust Act [57-1-1 to 57-1-15 NMSA 1978] shall be subject to a civil penalty; if an individual, the penalty shall be not more than fifty thousand dollars ($50,000), or, if a person other than an individual, the penalty shall be not more than two hundred fifty thousand dollars ($250,000).

C. No action for a civil penalty may be brought against any person for the same violation for which such person has been convicted in a criminal proceeding for violation of the federal antitrust laws.

D. For the purposes of Subsection A and B of this section, "individual" means a person other than a corpo-

ration, business trust, partnership, association or other governmental or legal entity.

57-1-8. Attorney general; injunctive relief.

The attorney general may bring an action in the name of the state against any person to enjoin, restrain and prevent the doing in this state of any act declared unlawful under Section 57-1-1 or 57-1-2 NMSA 1978.

57-1-9. Election of remedies.

The obtaining of a judgment under the Antitrust Act [57-1-1 to 57-1-15 NMSA 1978] to assess a civil penalty against a person shall be an election of remedies to not bring a criminal prosecution against such person under the Antitrust Act. The institution of a criminal prosecution under that act against a person by filing an information or complaint or returning an indictment shall be an election of remedies not to bring suit to assess a civil penalty against such person under that act.

57-1-10. District attorneys; enforcement.

In order to promote the uniform administration of the Antitrust Act [57-1-1 to 57-1-15 NMSA 1978] in New Mexico, the attorney general is to be responsible for its enforcement, but he may, on a case-by-case basis, delegate this authority to the district attorneys of the state and when this is done, the district attorneys shall have every power and duty conferred upon the attorney general by this act [57-1-1 to 57-1-3, 57-1-5 to 57-1-19 NMSA 1978].

57-1-11. Judgment in favor of state as prima facie evidence.

A. A final judgment or decree in a civil or criminal proceeding determining that a person has violated Section 57-1-1 or 57-1-2 NMSA 1978 in an action brought by the state is prima facie evidence against such person in any other action against him under the provisions of Section 57-1-3 NMSA 1978 as to all matters with respect to which the judgment or decree would be an estoppel between the parties thereto. This section does not affect the application of collateral estoppel or issue preclusion.

B. For the purposes of Subsection A of this section, "final judgment" or "decree" shall not include a consent judgment or decree entered before any testimony has been taken at trial in a civil proceeding or a judgment based upon a plea of nolo contendere in a criminal proceeding.

57-1-12. Limitations of actions.

A. An action brought under the provisions of Section 57-1-7 or 57-1-8 NMSA 1978 is barred if it is not commenced within four years after the cause of action accrues or within four years after the plaintiff discovered, or by the exercise of reasonable diligence should have discovered, the facts relied upon for proof of the cause of action, whichever is later.

B. An action brought under the provisions of Section 57-1-3 NMSA 1978 to recover damages is barred if it is not commenced within four years after the cause of action accrues or within four years after the plaintiff discovered, or by the exercise of reasonable diligence should have discovered, the facts relied upon for proof of the cause of action, whichever is later. Provided, however, that a cause of action is not barred if it is commenced

within one year after the conclusion of a timely action brought by the state under the provisions of Section 57-1-6, 57-1-7 or 57-1-8 NMSA 1978, based in whole or in part on any matter complained of in the action for damages, whichever is later.

C. For the purposes of this section, a cause of action for a continuing violation is deemed to accrue at any time during the period of the violation.

57-1-13. Actions involving interstate or foreign commerce.

No action under the Antitrust Act [57-1-1 to 57-1-15 NMSA 1978] shall be barred on the ground that the activity or conduct complained of in any manner affects or involves interstate or foreign commerce.

57-1-14. Remedies cumlative.

Subject to Section 57-1-9 NMSA 1978, the remedies afforded the state under the Antitrust Act [57-1-1 to 57-1-15 NMSA] shall be cumulative.

57-1-15. Construction.

Unless otherwise provided in the Antitrust Act [57-1-1 to 57-1-15 NMSA 1978], the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices.

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CLERK

No. 84-366

IN THE

Supreme Court of the United States

October Term, 1984

RAY BELL OIL COMPANY, INC.,
Appellant,

vs.

STATE OF NEW MEXICO,
Appellee.

ON APPEAL FROM THE NEW MEXICO COURT OF APPEALS

APPELLEE'S MOTION TO DISMISS

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No. 84-366

IN THE

Supreme Court of the United States

October Term, 1984

RAY BELL OIL COMPANY, INC.,
Appellant,

vs.

STATE OF NEW MEXICO,
Appellee.

ON APPEAL FROM THE NEW MEXICO COURT OF APPEALS

MOTION TO DISMISS

The State of New Mexico ("State") respectfully moves to dismiss this appeal on the following grounds:

1. The appeal is not within the jurisdiction of the Court, since there has been no decision by a State court as required by 28 U.S.C. Section 1257(2).

2. The question sought to be reviewed is moot and thus presents no justiciable case or controversy.

SUPPLEMENTAL STATEMENT OF FACTS

In May of 1982, a New Mexico grand jury indicted Appellant and others for violation of New Mexico's antitrust laws. *See* Sections 57-1-1 to 57-1-15, NMSA 1978, set forth in Appendix to Jurisdictional Statement at 27A-36A. The indictment charged a conspiracy to fix the retail price of gasoline. Appellant was charged alternatively under two subsections of the state statute. The first charge was based on Part A of Section 57-1-1 NMSA 1978 ("Part A"), which provides that:

> Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is hereby declared to be unlawful.

The second charge was based on Part B of Section 57-1-1 NMSA 1978 ("Part B"), which provides that:

> Every contract, agreement, combination or conspiracy which controls the quantity, price or exchange of any article of manufacture, product of the soil or mine or any goods or services in restraint of trade is hereby declared to be unlawful.

Both alternative charges were alleged to have been intentionally committed. *See* Indictment, set forth in Appendix, *infra.*

Appellant moved to dismiss the charge brought under Part A of the statute. Appellant contended that where price-fixing is charged, Part A is less specific than Part B and therefore superceded by it. The trial court granted Appellant's motion and dismissed that portion of the indictment.

The State appealed the dismissal to the New Mexico Court of Appeals. The sole issue presented was whether Part A of Section 57-1-1 had been properly charged. The Court of Appeals reversed and held that:

> [t]he trial court erred in dismissing the charge under Section 57-1-1(A), and in ruling that a conspiracy to control [prices] must be prosecuted under Section 57-1-1(B). The charges, being in the alternative, were proper in that one crime was charged as having been committed in two ways.
>
> Opinion of New Mexico Court of Appeals, quoted in Appendix to Appellant's Jurisdictional Statement at 7A.

Appellant's first due process claim was raised in its motion for rehearing to the New Mexico Court of Appeals. The Court of Appeals denied rehearing. Appellant attempted to raise this claim again in its petition for writ of certiorari to the New Mexico Supreme Court. Appellant's petition was granted, but the writ was later quashed as "having been improvidently issued." There was no opinion by the New Mexico Supreme Court. *See* Appendix to Jurisdictional Statement at 20A-23A.

On August 9, 1984, the State filed notice of nolle prosequi in the instant case of the alternative charge brought under Part B of the statute.[1] *See* Appendix, *infra.*

ARGUMENT

POINT I

THE APPEAL IS NOT WITHIN THE JURISDICTION OF THE SUPREME COURT.

This appeal has been taken under 28 U.S.C. Section 1257(2), which provides in pertinent part that:

---

[1] As a practical matter, the State could not dismiss the charge under Part B until the appellate courts determined that Part A of the statute did indeed apply to price-fixing.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of the statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellant seeks review by this Court of a significant constitutional question: the due process limitations of strict liability in a criminal antitrust context. However, the question has not been decided by the New Mexico courts. It is therefore outside the Supreme Court's appellate jurisdiction under 28 U.S.C. Section 1257(2).

Strict liability has never been an issue in this case. The grand jury charged an intentional violation. At the outset, the State stipulated that its theory under either alternative charge was an agreement to fix prices. *See* Court of Appeals Opinion, Appendix to Jurisdictional Statement at 6A and 10A. The only question before the New Mexico Court of Appeals was whether the charge under Part A had been improperly dismissed. The Court of Appeals reversed and held that "[t]he charges, being in the alternative, were proper in that one crime was charged as having been committed in two ways." The Court also took the opportunity to announce that "[n]o intent is required" for violation of Part B. *See* Opinion, quoted in Appendix to Jurisdictional Statement at 7A.

Appellant subsequently attempted to raise its constitutional concerns. However, Appellant was unsuccessful in soliciting a ruling: the Court of Appeals refused rehearing and the New Mexico Supreme Court granted but then quashed its writ of certiorari. Under New Mexico law, the correct procedure is to raise the issue in the trial court and then, if necessary, appeal

the ruling. *See, for example, Provencio v. New Jersey Zinc. Co.*, 86 N.M. 538, 542, 525 P.2d 898, 902 (N.M. Ct.App.), *cert. denied*, 86 N.M. 528, 525 P.2d 888 (1974) (due process claim).

The jurisdiction of this Court lies to review decisions of a State's highest court. 28 U.S.C. Section 1257(2). Without a decision, there is no jurisdiction. *Miller v. Nicholls*, 17 U.S. (4 Wheat.) 310 (1819); *Street v. New York*, 394 U.S. 576, 581-582 (1969). Clearly, no New Mexico court has addressed, let alone decided, the question at bar. The appeal should be dismissed for want of jurisdiction.

POINT II

THE QUESTION SOUGHT TO BE REVIEWED IS MOOT AND THUS PRESENTS NO JUSTICIABLE CASE OR CONTROVERSY.

The existence of an actual controversy is essential to the jurisdiction of this Court under Article III of the Constitution. The Court does not rule on moot questions, nor on hypothetical ones. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 229, 240-241 (1937).

As to Appellant, the question raised by this appeal is moot. The State has dismissed the charges against Appellant based on Part B of Section 57-1-1 NMSA 1978. *See* Appendix, *infra; and see* fn.1 *supra.* Appellant is under no conceivable threat of harm by an unconstitutional application of Part B.

Future defendants can raise all objections to this statute, constitutional or otherwise, in the New Mexico trial courts. They can have adverse rulings reviewed by the New Mexico appellate courts and by the Supreme Court. However, this Court has at bar no justiciable case or controversy. The appeal should be dismissed.

CONCLUSION

For the foregoing reasons, the Supreme Court should dismiss this appeal and remand the case back to the New Mexico courts for trial.

Respectfully submitted,

PAUL BARDACKE
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Counsel for Appellee

APPENDIX

Page

GRAND JURY INDICTMENT 1a

NOTICE OF NOLLE PROSEQUI[2] 3a

---

[2] The different Cause Numbers on the pleadings result from a stipulated change of venue, from Dona Ana County to Bernalillo County, New Mexico.

STATE OF NEW MEXICO COUNTY OF DONA ANA
IN THE DISTRICT COURT

STATE OF NEW MEXICO, Plaintiff, vs. J. B. RITTER DISTRIBUTING COMPANY, a limited partnership; W. K. "AJAX" SIMPSON; RAY BELL OIL COMPANY, INC., a corporation; and HARRY M. BUSH, JR., Defendants.	))))))))	No. CR - 82 - 94 Restraint of Trade; contrary to Sections 57-1-1, 6 NMSA 1978 (1981 Supp.) (one count per defendant) Fourth degree felony

GRAND JURY INDICTMENT

The Grand Jury charges:

Between the dates of July 1, 1979 and March 12, 1982, in Dona Ana County, State of New Mexico, the above-named defendants, J. B. Ritter Distributing Company, W. K. "Ajax" Simpson, Ray Bell Oil Company, Inc., and Harry M. Bush, Jr., intentionally contracted, agreed, combined, or conspired, one with another or with others, in restraint of trade or commerce, to fix, stabilize, maintain, or control the price of gasoline sold at retail gasoline stations in Dona Ana County, State of New Mexico, contrary to Sections 57-1-1, 6 NMSA 1978 (1981 Supp.), a fourth degree felony; or, in the alternative, the above-named defendants intentionally formed a contract, agreement, combination, or conspiracy, one with another or with others, which controlled the quantity, price or exchange of any article of manufacture, product of the soil or mine or any goods or services in restraint of trade; namely, gasoline sold at retail gasoline stations in Dona Ana County, State of New Mexico, contrary to Sections 57-1-1, 6 NMSA 1978 (1981 Supp.), a fourth degree felony.

Defendant J. B. Ritter Distributing Company is a limited partnership managed by defendant W. K. "Ajax" Simpson.

Defendant Ray Bell Oil Company, Inc. is a New Mexico corporation which has employed defendant Harry M. Bush, Jr. as manager of its operations in Dona Ana County, State of New Mexico.

The names of the witnesses upon whose testimony this indictment is based are Steve Davis, Amy Alexander, Orlando Salazar, Earl Byers, Sidney Adams, Angel Baca, Terry York, William Markle, Ray L. Foreman, Skip Foreman, Alton Vaughn, Bobby Melton, Gerald A. Riopelle, John Herbert Charles, John Sleever, Franklin McKinney, Marvin Hillger, Scott Hillger, Jack Sharp, Lewis K. Thompson, Harry Sanchez, and Ross Becker.

I hereby certify that the foregoing indictment is a TRUE Bill.

/s/ Neri G. Frietze
FOREMAN

13 May, 1982
DATES

APPROVED:

/s/ James J. Wechsler
ASSISTANT ATTORNEY GENERAL

IN THE SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff,

vs. No. CR-35807

RAY BELL OIL COMPANY, INC.,
Defendant.

NOTICE OF NOLLE PROSEQUI OF ALTERNATIVE CHARGE OF THE INDICTMENT BROUGHT UNDER SECTION 57-1-1 (B), NMSA 1978, AS AMENDED

AND

NOTICE OF INTENT TO PROCEED TO TRIAL ON ALTERNATIVE CHARGE OF THE INDICTMENT BROUGHT UNDER SECTION 57-1-1 (A), NMSA 1978, AS AMENDED

COMES NOW the State of New Mexico and hereby notifies the defendant that the charge of the indictment brought under Section 57-1-1 (B), NMSA 1978 as amended; namely:

> . . . the above-named defendants intentionally formed a contract, agreement, combination or conspiracy, one with another or with others, which controlled the quantity, price or exchange of any article of manufacture, product of the soil or mine or any goods or services in restraint of trade; namely, gasoline sold at retail gasoline stations in Dona Ana County, State of New Mexico . . .

will not be prosecuted further by the State of New Mexico.

Defendant is hereby notified that the State intends to proceed to trial only on the alternative charge of the Indictment brought under Section 57-1-1 (A), NMSA as amended; namely:

> (the defendant) intentionally contracted, agreed, combined, or conspired, one with another or with others, in restraint of trade or commerce to fix, stabilize, maintain or control the price of gasoline sold at retail stations in Dona Ana County, State of New Mexico . . .

as interpreted by the New Mexico Court of Appeals in the case of *State v. Ray Bell Oil Company, Inc.*, No. 6045, filed May 24, 1983.

Respectfully submitted,

PAUL BARDACKE
Attorney General

/s/ Stephen Westheimer
STEPHEN WESTHEIMER
Assistant Attorney General

Attorneys for the State of
New Mexico
P. O. Drawer 1508
Santa Fe, New Mexico 87504
827-6000

I hereby certify that a true copy of the foregoing was mailed to Charles W. Daniels, Esq., opposing counsel of record on the 9th day of August, 1984.

/s/ Dan Pearlman
Assistant Attorney General